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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 176

EUSTACE HARDING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 34-37) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 3, 1950 (R. 37-38). The petition for a writ of certiorari was filed July 3, 1950. The jurisdiction of this Court is invoked under 28

U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction of illegally carrying on the business of a distiller.

STATUTE INVOLVED

Section 2833(a) of the Internal Revenue Code (26 U.S.C. 2833(a)) provides in pertinent part:

> Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

STATEMENT

Count 2 of a 4-count indictment (R. 1-3) filed in the District Court for the Eastern District of Virginia charged petitioner and two co-defendants —Floyd Alvin Grinnan and Chester Brown—with carrying on the business of a distiller without having given bond as required by law, in violation of Section 2833(a) of the Internal Revenue Code, *supra*. Counts 1, 3, and 4 charged the same defendants with having in their custody an unregistered still, making mash fit for distillation on un-

authorized premises, and concealing distilled spirits with intent to defraud the United States of taxes, in violation of Sections 2810(a), 2834, and 3321(a) (26 U.S.C. 2810(a) 2834, 3321(a)), respectively. Following a trial before the court, a jury having been waived (Tr. 84),[1] all three defendants were found guilty (R. 34). Petitioner was sentenced generally to imprisonment for one year and one day and to pay a fine of $700 (R. 5). On appeal by petitioner alone to the Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed (R. 37-38), one judge dissenting (R. 35-37).

The evidence adduced by the Government in support of petitioner's conviction on count 2, *supra,* may be summarized as follows:[2]

On June 3, 1948, Samuel Burgess, an investigator attached to the Alcohol Tax Unit, Bureau of Internal Revenue, and another investigator, acting on certain information received by them, began to search in the neighborhood of petitioner's house for evidence of a still. Finding an old path

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[1] "Tr." refers herein to the original typewritten transcript of record on file in this Court.

[2] Since petitioner's general sentence of one year and a day in prison and a $700 fine is within the maximum allowable punishment fixed by Section 2833(a) of the Internal Revenue Code, *supra,* p. 2, on which the second count of the indictment was predicated, it is unnecessary to consider whether the evidence is sufficient to support the convictions on the remaining counts. *Pinkerton* v. *United States,* 328 U.S. 640, 641-642, fn. 1, and cases cited.

which showed some evidence of recent travel, they followed the signs of travel until they led to a still site in the open woods approximately three-quarters of a mile from petitioner's house. There were three barrels of mash at the site, but no still was set up, and no one was in the vicinity. (R. 6-7, 10-13; Tr. 13, 22-23, 36.)

On June 9, 1948, the investigators returned to the still site, and found that a still had been partially installed in the meantime. They waited in the woods nearby from 11 a.m to 3:40 p.m. but saw no one at or near the still during that time. (R. 7-8, 16, 31; Tr. 15-16, 26.) Returning at about 6:30 p.m., they found the still in operation, with one and one-half gallons of whiskey already made. Petitioner's codefendants, Brown and Grinnan, were at the still, and petitioner was about ten yards away, approaching the still along the path from his home. All three were wearing work clothes. There is no suggestion that Brown or Grinnan showed surprise at petitioner's approach. On seeing the investigators, all three men ran off. Grinnan was caught, but petitioner and Brown escaped. (R. 8-10, 13-15, 16-18, 29; Tr. 40-48.) Burgess, who had recognized Brown and petitioner, then went to each of their homes and advised their wives that they had been recognized at the still and that they should give themselves up. A month or two later, petitioner surrendered to the investigators. (R. 13-14, 29-30, 31.)

According to witnesses for the defense, petitioner, an employee in his cousin's saw mill, located some six miles from his home, had worked at the mill from 7 a.m. to 4:30 p.m. on June 9, 1948, the date of the alleged offenses; he left the mill at 5 p.m. and arrived at his home at about 6:00 or 6:30 p.m. (R. 20-23; Tr. 51-58). Petitioner himself did not testify, and he adduced no evidence tending to explain his presence near the still, his flight, or the signs of travel between his home and the still.

ARGUMENT

Petitioner's sole contention is that the evidence is insufficient to sustain his conviction. We submit that the majority below were correct in holding that the evidence is sufficient to support his conviction on count 2, charging the illicit carrying on the business of a distiller.[3]

Petitioner's presence in the close vicinity of an operating still, the evidence of recent travel between his house and the still, and the circumstance of his instantaneous flight upon the appearance of the investigators, all justified an inference of guilt. Petitioner offered no explanation of any of these circumstances.[4] The flight of the accused always has "a tendency to establish his guilt" (*Allen* v.

[3] For the reasons stated in note 2, *supra*, p. 3, his general sentence on all four counts must be sustained if the evidence is adequate to sustain his conviction on the second count.

[4] His present suggestion that he was merely out for a stroll (Pet. 8, 12) is hardly plausible in view of the testimony that he had just returned from nine hours of hard outdoor labor as a logger.

United States, 164 U.S. 492, 499; *Bird* v. *United States,* 187 U.S. 118, 131) and in the situation here presented that tendency was a strong one. As the majority below observed (R. 35), "presence so near the illicit operation and flight when officers of the law made their appearance lead reasonably to the conclusion that those who were present and fled must have had some guilty connection with what was going on. We cannot say that the judge was not justified in taking the view which other reasonable men would take of the circumstances." Whether petitioner's guilt was that of a principal in the illegal operation, or merely that of an aider and abettor of the others, was, of course, irrelevant. See 18 U.S.C. [1946 ed.] 550; *Bozza v. United States,* 330 U.S. 160, 164.

The decision below is not in conflict with the *Bozza* decision, as petitioner contends (Pet. 5, 9-11). Bozza's conviction under Section 2833(a) of the Internal Revenue Code—the same section as that on which count 2 of the instant indictment was predicated—was upheld by this Court. And this Court's acceptance of the Government's concession that, on the particular facts there present, his conviction should be reversed on two other counts rested on the recognition that the charges laid in those counts were more narrowly drawn and required a more specific character of proof than that necessary for the more general offense of carrying on the business of a distiller. Nor is there

conflict with the Court of Appeals decisions cited by petitioner.[5] Since both courts below have upheld the sufficiency of the evidence we submit there is no occasion for further review. See *Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590.

CONCLUSION

The judgment below is correct, and no conflict of decisions or question of importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1950.

[5] Only one of the cases cited, *Parente* v. *United States,* 82 F. 2d 722 (C.A. 8), involved the charge of carrying on the business of a distiller. In the *Parente* case, the only evidence to sustain conviction was the petitioner's presence in the first floor of a building in which liquor was being made in the basement. There was no flight, and no proof that he observed the operations going on in the basement. Similarly none of the other cases cited involved presence in full sight of an operating still and instantaneous flight upon appearance of the investigators.

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v.

UNITED STATES OF AMERICA

On Petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER

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REPLY BRIEF ON BEHALF OF PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The brief for respondent, by limiting its argument to the sufficiency of the evidence on count two of the indictment and by stating on page 2 of its brief that the only question presented is the sufficiency of the evidence to convict petitioner of illegally carrying on the business of a distiller in effect admits the insufficiency of the evidence to convict on counts one, three, and four of the indictment. Therefore the argument of this reply brief will be limited to count two of the indictment and the facts and law pertaining thereto.

Facts

Brief for respondent draws certain erroneous or unwarranted conclusions from the evidence as disclosed by the record.

1. Brief for respondent concludes that there was a path from the home of petitioner to the still.

There is no evidence in the record that a path led from the home of the petitioner to the still or the still site. A reading of the testimony on this point (particularly R. 7) shows that the investigators found no path leading from Harding's home, that they did find an old path which appeared as if it were no longer being used and which began at a field some distance from petitioner's house and did not run continuously to the still. In this connection it should also be pointed out that there were other houses in the vicinity both of petitioner's home and the still (R. 11-13).

2. Respondent, in its brief, concludes that petitioner was "approaching the still along the path from his home."

We have already shown that there was no path leading from petitioner's home. We further point out that there is absolutely no testimony in the record that petitioner was at any time on any path whatsoever. We have scrupulously examined the record on this point and can find no evidence that petitioner was on any path whatsoever; our conclusion from Burgess's testimony (R. 13) is that petitioner was merely walking through the woods.

3. Respondent's brief makes a point of the fact that "there was no suggestion that Brown or Grinnan showed surprise at petitioner's approach."

There is no evidence in the record whatsoever that either Brown or Grinnan saw or could have seen petitioner.

Law

Respondent in its brief tries to make capital of the fact that because in the Bozza case, *Bozza* v. *United States,* 320 U.S. 160 (1947), the conviction of Bozza was sustained upon a count of unlawfully carrying on the business of a distiller, similar to count two in the instant case, the Bozza case is not controlling in the instant case. We do not wish to labor the point, for we have argued the Bozza case at length in our brief supporting our petition, but we do want to point out that in the Bozza case there was clear, convincing, and uncontroverted evidence that Bozza had actually worked in and around the still, took instructions from the owner thereof and helped manufacture the alcohol. In fact this was assigned by the Supreme Court of the United States as the reason why the conviction on that count was sustained; the case holds that mere presence is not enough.

Respondent asserts in its brief that because two Courts have already passed upon the sufficiency of the evidence, there is no further cause for review, and cites on page 7 of its brief three cases to sustain this proposition. We point out that in the *Bozza* case, *supra*, the two lower courts had passed on the sufficiency of the evidence and yet the Supreme Court of the United States granted certiorari and passed upon the matter.

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